Supreme Court of the United States.

No. 12, Original.—October Term, 1906.

The United States of America
vs.
John F. Shipp et al.
} Information in Contempt.

[December 24, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an information charging a contempt of this Court and is to the following effect. On February 11, 1906, one Johnson, a colored man, was convicted of rape upon a white woman, in a Criminal Court of Hamilton County, in the State of Tennessee, and was sentenced to death. On March 3 he presented a petition for a writ of *habeas corpus* to the United States Circuit Court, setting up, among other things, that all negroes had been excluded, illegally, from the grand and petit juries; that his counsel had been deterred from pleading that fact or challenging the array on that ground, and also from asking for a change of venue to secure an impartial trial, or for a continuance to allow the excitement to subside, by the fear and danger of mob violence; and that a motion for a new trial and an appeal were prevented by the same fear. For these and other reasons it was alleged that he was deprived of various constitutional rights, and was about to be deprived of his life without due process of law.

On March 10, after a hearing upon evidence, the petition was denied, and it was ordered that the petitioner be remanded to the custody of the sheriff of Hamilton County, to be detained by him in his custody for a period of ten days, in which to enable the petitioner to prosecute an appeal, and in default of the prosecution of the appeal within that time to be then further proceeded with by the State Court under its sentence. On March 17 an appeal to this Court was allowed by Mr. Justice Harlan. On the following Monday, March 19, a similar order was made by this Court, and it was ordered further "that all proceedings against the appellant be stayed, and the custody of said appellant be retained pending this appeal."

The sheriff of Hamilton County was notified by telegraph of the order, receiving the news before six o'clock on the same day. The evening papers of Chattanooga published a full account of what this Court had done. And it is alleged that the sheriff and his deputies were informed, and had reason to believe, that an attempt would be made that night by a mob

to murder the prisoner. Nevertheless, if the allegations be true, the sheriff early in the evening withdrew the customary guard from the jail, and left only the night jailer in charge. Subsequently, it is alleged, the sheriff and the other defendants, with many others unknown, conspired to break into the jail for the purpose of lynching and murdering Johnson, with intent to show contempt for the order of this Court, and for the purpose of preventing it from hearing the appeal and Johnson from exercising his rights. In furtherance of this conspiracy a mob, including the defendants, except the sheriff Shipp and the night jailer Gibson, broke into the jail, took Johnson out and hanged him, the sheriff and Gibson pretending to do their duty, but really sympathizing with and abetting the mob. The final acts as well as the conspiracy are alleged as a contempt.

The defendants have appeared and answered, and certain preliminary questions of law have been argued which it is convenient and just to have settled at the outset before any further steps are taken. The first question, naturally, is that of the jurisdiction of this Court. The jurisdiction to punish for a contempt is not denied as a general abstract proposition, as, of course, it could not be with success. *Ex parte Robinson*, 19 Wall. 505, 510. *Ex parte Terry*, 128 U. S. 289, 302, 303. But it is argued that the Circuit Court had no jurisdiction in the *habeas corpus* case, unless Johnson was in custody in violation of the Constitution, Rev. Sts. § 753, and that the appellate jurisdiction of this Court was dependent on the Act of March 3, 1891, c. 517, § 5, (26 Stat. 827,) *Ex parte Lennon*, 150 U. S. 393, and by that Act did not exist unless the case involved 'the construction or application of the Constitution of the United States.' If the case did not involve the application of the Constitution, otherwise than by way of pretense, it is said that this Court was without jurisdiction, and that its order might be contemned with impunity. And it is urged that an inspection of the evidence before the Circuit Court, if not the face of the petition, shows that the ground alleged for the writ was only a pretense.

We regard this argument as unsound. It has been held, it is true, that orders made by a Court having no jurisdiction to make them may be disregarded without liability to process for contempt. *Ex parte Sawyer*, 124 U. S. 200. *Ex parte Fisk*, 113 U. S. 713. *Ex parte Rowland*, 104 U. S. 604. But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this Court had no jurisdiction of the appeal, this Court, and this Court alone, could decide that such was the law. It and it alone necessarily had jurisdiction to decide whether the case was properly before it. On that question, at least, it was its duty to permit argument and to take the time required for such consideration as it might need. See *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 387. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions

and the subject of the petition, just as the State Court was bound to refrain from further proceedings until the same time. Rev. Sts. § 766. Act of March 3, 1893, c. 226, 27 Stat. 751. The fact that the petitioner was entitled to argue his case shows what needs no proof, that the law contemplates the possibility of a decision either way, and therefore must provide for it. Of course the provision of Rev. Sts. § 766, that until final judgment on the appeal further proceedings in the State Court against the prisoner shall be deemed void, applies to every case. There is no implied exception if the final judgment shall happen to be that the writ should not have issued or that the appeal should be dismissed.

It is proper that we should add that we are unable to agree with the premises upon which the conclusion just denied is based. We cannot regard the grounds upon which the petition for *habeas corpus* was presented as frivolous or a mere pretense. The murder of the petitioner has made it impossible to decide that case, and what we have said makes it unnecessary to pass upon it as a preliminary to deciding the question before us. Therefore we shall say no more than that it does not appear to us clear that the subject matter of the petition was beyond the jurisdiction of the Circuit Court, and that, in our opinion, the facts that might have been found would have required the gravest and most anxious consideration before the petition could have been denied.

Another general question is to be answered at this time. The defendants severally have denied under oath in their answer that they had anything to do with the murder. It is urged that the sworn answers are conclusive, that if they are false the parties may be prosecuted for perjury, but that in this proceeding they are to be tried, if they so elect, simply by their oaths. It has been suggested that the Court is a party and therefore leaves the fact to be decided by the defendant. But this is a mere afterthought to explain something not understood. The Court is not a party. There is nothing that affects the Judges in their own persons. Their concern is only that the law should be obeyed and enforced, and their interest is no other than that they represent in every case. On this occasion we shall not go into the history of the notion. It may be that it was an intrusion or perversion of the canon law, as is suggested by the propounding of interrogatories and the very phrase, purgation by oath; (*juramentum purgatorium*,). If so, it is a fragment of a system of proof which does not prevail in theory or as a whole, and the reason why it has not disappeared perhaps may be found in the rarity with which contempts occur. It may be that even now, if the sole question were the intent of an ambiguous act, the proposition would apply. But in this case it is a question of personal presence and overt acts. If the presence and the acts should be proved there would be little room for the disavowal of intent. And when the acts alleged consist in taking part in a murder it cannot be admitted that a general denial and affidavit should

dispose of the case. The outward facts are matters known to many and they will be ascertained by testimony in the usual way.—The question was left open in *Ex parte Savin*, 131 U. S. 267, with a visible leaning toward the conclusion to which we come, and that conclusion has been adopted by State Courts in decisions entitled to respect. *Huntington* v. *McMahon*, 48 Conn. 174, 200, 201. *State* v. *Matthews*, 37 N. H. 450, 455. *Bates's Case*, 55 N. H. 325, 327. *Matter of Snyder*, 103 N. Y. 178, 181. *Crow* v. *State*, 24 Tex. 12, 14. *State* v. *Harper's Ferry Bridge Co.*, 16 W. Va. 864, 873. See *Wartman* v. *Wartman*, Taney, 362, 370. *Cartwright's Case*, 114 Mass. 230. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31. Whether or not Rev. Sts. § 725 applies to this Court, it embodies the law so far as it goes. We see no reason for emasculating the power given by that section, and making it so nearly futile as it would be if it were construed to mean that all contemnors willing to run the slight risk of a conviction for perjury can escape.

The question was touched, in argument, whether the acts charged constitute a contempt. We are of opinion that they do, and that their character does not depend upon a nice inquiry, whether, after the order made by this Court, the sheriff was to be regarded as bailee of the United States or still held the prisoner in the name of the State alone. Either way, the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this Court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

These preliminaries being settled the trial of the case will proceed.

Mr. Justice MOODY took no part in the decision.

True copy.

Test:

Clerk Supreme Court U. S.

Supreme Court of the United States.

No. 5, Original.—October Term, 1908.

The United States of America, Complainant,
vs.
Joseph F. Shipp et al.
} Information in contempt.

[May 24, 1909.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This was an information filed by the Attorney General of the United States against Joseph F. Shipp and twenty-six other defendants, which was dismissed as to eighteen of them and heard as to defendants Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse and Ward.

The information charged, in substance, that February 11, 1906, Ed Johnson, a negro, was convicted of rape by the criminal court of Hamilton County, Tenn., held in Chattanooga, and was sentenced to death; that on March 3, following, Johnson filed a petition for the writ of *habeas corpus* in the United States Circuit Court, sitting in Tennessee, alleging that in the trial he had been deprived of constitutional rights; that on March 10 the petition was dismissed and the writ denied, petitioner being remanded to the sheriff of Hamilton County to be detained in his custody for ten days, in which to enable petitioner to prosecute an appeal, and in default of such appeal to be further proceeded with by the State court under its sentence; that on March 17 Mr. Justice Harlan, of the United States Supreme Court, allowed an appeal from the decision of the Circuit Court, and on March 19 an order was made by the Supreme Court allowing said appeal; that defendant Shipp, sheriff of Hamilton County, then was at once notified by telegraph of said order, which stayed all proceedings against Johnson, and required Shipp to retain custody of Johnson pending determination of the appeal; that before 6 o'clock in the evening of March 19 a full account of this action of the Supreme Court was published and circulated in the evening papers in the city of Chattanooga; that defendant Shipp was the sheriff of Hamilton County and defendants Matthew Galloway and Jeremiah Gibson, among others, were his deputies; that the deputies as well as the sheriff were fully advised of the action of the Supreme Court, and were informed and had every reason to believe, from current reports and rumors conveyed to them, that an attempt would be made on the evening of the 19th or early in

the morning of the 20th, by a mob composed of a large number of armed men, to force an entrance into the county jail for the purpose of taking Johnson therefrom and lynching him; that notwithstanding said information and said reports the sheriff withdrew from the jail early in the evening of the 19th the usual and customary guard, and left in charge thereof only the night jailer—defendant Gibson—and committed other acts and did other things evincing a disposition on the part of said sheriff to render it less difficult and less dangerous for the mob to prosecute and carry into effect its unlawful design and purpose of lynching Johnson; that about 9 o'clock in the evening of said March 19 defendants and others conspired to break into the jail for the purpose of taking Johnson therefrom and lynching him, with intent to show their contempt and disregard for the above-mentioned order of this court, and prevent it from hearing the appeal of Johnson; that pursuant to this conspiracy and in order to show their contempt and disregard for said order of this court, between 9 and 12 o'clock in the evening of said March 19, at Chattanooga, Tenn., defendants, excepting Shipp and Gibson, assembled with others, broke into the jail, took Johnson out by force, and lynched him; that Gibson was the only officer at the jail when the mob broke in, and that while the mob was in possession of the jail defendant Shipp arrived, but made no effort to prevent the mob from taking Johnson from the jail; that defendants Shipp and Gibson were in sympathy with the mob while pretending to perform their official duty of protecting Johnson, and that they aided and abetted the mob in prosecution and performance of the lynching; that all of these acts were committed by defendants with the intent upon their part to utterly disregard the above-mentioned order of this court and to prevent the court from hearing Johnson's appeal.

The answers on questions of fact consisted of a general denial and, except in the cases of Shipp, Gibson and Williams, the setting up of an alibi by each defendant. Williams admits that he was at the jail a short time before and at the time Johnson was taken from it by the mob, and that he followed the mob and witnessed the lynching, but denies participating in the acts of the mob.

Certain preliminary questions of law were raised by defendants and passed upon by the court. 203 U. S. 563. It was held that the complaint sufficiently set forth a contempt of this court; that it was unnecessary for the purposes of this proceeding to determine whether or not the Circuit Court had jurisdiction of the *habeas corpus* proceedings or whether this court had jurisdiction to entertain the appeal, as those were questions for this court to determine and for no other tribunal; and that the answers of the defendants, under oath, disavowing intent did not purge them.

The case then came on to be heard on the question whether the allegations of the information were made out.

The following is a sufficient *resumé* of the facts admitted or undisputed:

January 23, 1906, a rape was committed upon a white woman in or near Chattanooga, Hamilton County, Tenn.

At that time and at all times hereinafter mentioned defendant Shipp was the duly elected, qualified and acting sheriff of Hamilton County, Tenn., and as such sheriff had and exercised full charge and control of the county jail located in Chattanooga, and was the legal custodian under the laws of Tennessee of all persons duly committed in said county under the laws of the State to confinement and imprisonment within the jail, and the defendants Matthew Galloway and Jeremiah Gibson were duly appointed, qualified and acting deputy sheriffs under Shipp.

January 25 Shipp and his deputies arrested Ed Johnson, a negro, in or near Chattanooga, charged with the crime.

Late in the afternoon of the same day Johnson was, by order of the judge of the State criminal court, taken by Sheriff Shipp to Dayton and from there to Nashville, where he was kept until the day of his trial, February 6. Johnson was removed and kept away from Chattanooga during this period because of fear that he would be lynched.

The night of January 25 a large mob attacked the jail at Chattanooga, where Johnson was supposed to be confined.

Three of Shipp's deputies were at the jail, and, with the assistance given them by the police, the chairman of the safety committee, and others, prevented the taking of any prisoners from the jail.

At the suggestion of the deputies the mob appointed a committee to go through the jail and satisfy itself that Johnson was not there.

Even after this committee had reported that the persons whom the mob sought were not in the jail, it was necessary to use force to put the mob out of the jail yard.

The dangerous character of this committee and the mob and their anger at not being able to find Johnson is shown by the testimony of the prosecuting officer for Hamilton County; the judge of the criminal court of that county; and defendant Galloway.

One other night, about the same time, the officers thought there was to be a mob. The militia was called out twice about that time to protect the jail against a mob which sought to take Johnson's life.

January 26 a special grand jury was convened, and the next day indicted Johnson for the crime above referred to.

February 6 Johnson was brought to Chattanooga from Nashville and his trial commenced that day in the criminal court of Hamilton County. February 9 he was convicted and sentenced to death.

The date of execution was originally fixed as March 13, but on or about March 11 was changed by the governor to March 20.

No appeal to the Supreme Court of the State was taken by the lawyers appointed by the court to defend Johnson.

Two daily papers were published in Chattanooga—The Times, a morning paper, and The News, an evening paper, both having a large circulation. Three competent and leading attorneys had been appointed by the court to defend Johnson, and one of them made a statement, which was published in The Chattanooga Times of February 10, as to the reasons why an appeal was not prosecuted in Johnson's behalf. He depicts the mental strain that he and his associates had been under, and the weight of the burden of the responsibility upon them. He says that when the jury brought in a verdict of guilty "we, as the attorneys, had to settle the question whether the case would be appealed to the Supreme Court." He asked the trial judge to appoint three other lawyers to counsel and advise with them and help to share the responsibility, and three well-known lawyers were designated, who met with the three counsel for the petitioner and considered the matter.

"We discussed the recent mob uprising and the state of unrest in the community. It was the judgment of all present that the life of the defendant, even if the wrong man, could not be saved; that an appeal would so inflame the public that the jail would be attacked and perhaps other prisoners executed by violence. In the opinion of all of us a case was presented where the defendant, now that he had been convicted by a jury, must die by the judgment of the law, or else, if his case were appealed, he would die by the act of the uprising of the people.

* * * * * *

"In view of all the conditions, it was the unanimous vote that the law ought to be allowed to take its course if Judge McReynolds were satisfied with the verdict, and if he were to approve it and pass judgment of death on it."

He then relates an interview had thereupon with the accused. His right of appeal was explained to him, "that the Supreme Court met in September next; that an appeal would stay the judgment until that time; that we did not see any reasonable ground to suppose that the Supreme Court would reverse the sentence, and that we feared an appeal would cause mob violence against him."

* * * * * *

"Without giving all that occurred at the jail, he said to us that he did not want to die by a mob; that he would do as we thought best. He said he would go over to the court house and tell the judge that he did not have anything more to say than that he was not the guilty man.

"I want the people to know that the foregoing facts moved us to allow the law to take its course under the verdict of the jury and the judgment of Judge McReynolds. Six lawyers settled it in this way after the calmest reflection and under the keenest sense of the great responsibility.

"In view of the awfulness of the crime committed, I beg that the sheriff and every peace officer of Chattanooga and Hamilton County will still try to get all possible further light, and if any person anywhere knows anything whatever tending to show or reflect light on either the guilt or innocence of the defendant, I beg that such person make known all that he may know to us or to Attorney General Whitaker."

On the afternoon Johnson was convicted he was secretly taken from Chattanooga to Knoxville because of fear of mob violence to him.

From the time the crime was committed until after Johnson's trial the people of Chattanooga were greatly excited over the crime and Johnson's alleged connection with it, and there was great apprehension on the part of the people as well as the officers that attempts would be made to lynch Johnson.

It was because of this intense excitement and the feeling that speedy execution of Johnson might prevent his being lynched that Johnson was so quickly indicted and tried.

While the trial was in progress extra deputies were sworn in and an unusual number of guards were kept around the court house and at the jail at night.

Guns to be used in protecting the jail against a mob were purchased.

March 3 Johnson filed a petition for a writ of *habeas corpus* in the United States Circuit Court for the Northern Division of the Eastern District of Tennessee.

March 10, 1906, the petition was denied, the Circuit Court ordering that Johnson be remanded to the custody of the sheriff of Hamilton County, Tenn., to be detained by him for ten days in which to enable petitioner to prosecute an appeal from said order, and in default of the prosecution of said appeal within that time to be then further proceeded with under the sentence.

This order was made public through the press.

Johnson was at Knoxville, where he had been kept since his conviction, for hearing upon his petition, and was taken back to Chattanooga, March 11.

Saturday, March 17, application was duly presented by Johnson to Mr. Justice Harlan of the Supreme Court of the United States, (Circuit Justice of the Sixth Circuit,) at Washington, asking that an appeal be allowed to that court from the order of the Circuit Court, denying Johnson's petition for a writ of *habeas corpus*. This appeal was allowed by Mr. Justice Harlan on the same day.

March 18, The Chattanooga Times published notice that application for said appeal had been made.

The same day Judge Clark, of the United States Circuit Court, received a telegram from Mr. Justice Harlan, which was communicated to

Sheriff Shipp on the afternoon of that day, that he had allowed appeal to accused in *habeas corpus* case of Ed Johnson; that the transcript would be filed the next day, and motion also be made by Johnson's counsel for formal allowance of appeal by the Supreme Court.

March 19, The Chattanooga Times published news of the allowance of the appeal by Mr. Justice Harlan, in which it said, among other things:

"From these authorities it was learned that the granting of an appeal in a case like this acted to supersede all process in the State courts. No stay is necessary, according to the authorities, and the statute is self-operative. Pending a decision of the appeal there can be no execution by any State authority."

March 19 an order was made by the United States Supreme Court, allowing an appeal to that court from the final order of the Circuit Court denying petition for writ of *habeas corpus*, and directing that all proceedings against the appellant be stayed, and that the custody of appellant be retained pending the appeal.

About 1 o'clock in the afternoon of said March 19 the following telegram was delivered to a telegraph company for transmittal to the addressee:

"Washington, March 19, 1906.

To Sheriff of Hamilton County, Tenn., Chattanooga, Tenn.

"Supreme Court of United States has allowed Ed Johnson appeal from Judge Clark's order, and directed all further proceedings stayed, and custody of Johnson retained pending appeal here. See section 766, Revised Statutes of the United States.

JAMES H. MCKENNEY,
Clerk Supreme Court, U. S."

This was received by the telegraph office at Chattanooga about 3.30 on the same afternoon and delivered between 4 and 5 o'clock on that afternoon.

About 2 o'clock on the afternoon of the 19th Judge McReynolds told Sheriff Shipp that the Supreme Court had granted a stay in the Johnson case, and that thereafter Johnson was a Federal prisoner.

Between 2 and 4 of the afternoon of March 19 the following telegram was received by Judge Clark, and by his secretary communicated to Sheriff Shipp, at the jail, about 5 o'clock that afternoon, with a copy of the statute therein referred to:

"Washington, D. C., March 19, 1906.

Hon. C. D. Clark, United States Court, Chattanooga, Tenn.

"Court has just allowed appeal in Johnson's case, and ordered all further proceedings against him delayed and custody retained pending appeal

here. It will be well to call attention of State officers immediately to section 766 of Revised Statutes.

JOHN M. HARLAN."

The statute referred to reads (including the proviso added March 3, 1893):

"Pending the proceedings on appeal in the cases mentioned in the three preceding sections and until final judgment therein, and after final judgment of discharge, any proceedings against the person imprisoned or confined or restrained of his liberty, in any State, court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void.

"*Provided*, That no such appeal shall be had or allowed after six months from the date of the judgment or order complained of."

Shipp understood that thereupon Johnson was held as a Federal prisoner.

There was published and circulated in Chattanooga, in the evening paper published in that city, on March 19, about 4 o'clock, an account of said action of the Supreme Court, under the headlines, "An Appeal is Allowed. Ed Johnson Will Not Hang To-morrow." This reads, in part:

"The gallows in the Hamilton County jail has again been disappointed in the case of Ed Johnson, convicted by the State courts of rape and sentenced to death. The hanging will not take place to-morrow morning, as scheduled."

The news of the action of the court was also posted on a newspaper bulletin.

After hearing of the stay Shipp says that he made no effort and gave no orders to have deputies or others guard the jail, but left the night jailer, defendant Gibson, there alone.

The county jail at Chattanooga, in which Johnson was confined on the 19th, consisted of four stories, two above ground and two below ground. Entrance to the jail was on the third floor, counting from the bottom. In the front part of the building, on this third floor, was an office section. An iron door led from this section into the jail proper; that is, the protected part of the building, where the prisoners were kept. Johnson was confined on the top floor. To reach him from outside the jail it was necessary to go through the offices, through the iron door between the offices and the jail proper, up a flight of stairs, through a steel-barred door, right behind which was a circular door consisting of heavy steel bars several inches apart, which revolved so as to make a passage. Passing through this circular door one came into a corridor around which were cells having iron doors which could be locked. It was in one of these cells that Johnson was confined.

The jail was located in a populous neighborhood and there were houses around it.

In the evening of the 19th a white male prisoner was removed from the upper floor of the county jail in Chattanooga, leaving only Johnson and a white woman on that floor.

This same man had been removed in the same way at the time of the first attempt to lynch Johnson.

About half-past 8 or 9 that night a number of men entered the jail and went directly and without resistance to the door leading to Johnson's corridor. There is a conflict of evidence as to whether the door leading from the offices to the jail proper was locked during the evening, but if it was locked when the mob came it was easily broken down.

Gibson was the only officer there at the time, and he was on the top floor with Johnson.

Keys were obtained from him without resistance, but, as the lock on the door leading to the corridor where Johnson's cell was located had been broken by a member of the mob, the keys would not work.

The mob, with sledge and ax, then began to break the bolts on the corridor door.

About twelve men were actively engaged in breaking down the door and in all subsequent events of the lynching. Some of these men were masked.

A crowd of spectators began to gather around the jail soon after the mob reached it, and continued to gather in and around the jail until Johnson was taken out. This crowd was variously estimated from a few to 150 or more.

It took over an hour to break the bolts on the corridor door.

Two men then went through the circular door and in a few minutes brought Johnson out with his arms tied with a rope.

When Johnson was thus brought out, the dozen men or so composing the mob grabbed him.

This mob took Johnson from the jail to the county bridge over the Tennessee River, which was about six blocks from the jail.

Johnson was taken from the jail a little after 10 o'clock.

From the foregoing it is apparent that there was no interference or attempted interference of any consequence with the mob before it left the jail, and there was none after it left.

The crowd which had gathered around the jail followed the mob down to the bridge.

When the bridge was reached the mob took Johnson a little beyond an arc light, put a rope around his neck, threw it over a beam, and swung him up.

At the bridge the mob actively engaged in lynching Johnson were close to him and separated by a space from the crowd of spectators.

The first time Johnson was swung up, the rope broke or slipped and he fell. He was swung up a second time and shot. After some shots were fired, Johnson again fell, and while lying on the ground was again shot. It was about ten minutes after the mob had reached the bridge until Johnson was killed.

It is apparent that a dangerous portion of the community was seized with the awful thirst for blood which only killing can quench, and that considerations of law and order were swept away in the overwhelming flood. The mob was, however, willing at the first attempt to accept prompt administration of the death penalty adjudged at a trial conducted according to judicial forms, in lieu of execution by lawless violence, but delay by appeal, or writ of error, or *habeas corpus* was not to be tolerated.

Under then existing statutory provisions appeals might be taken to this court from final decisions of the Circuit Courts in *habeas corpus* in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and if the restraint was by any State court, or by or under the authority of any State, further proceedings could not be had against him pending the appeal. Rev. Stat. §§ 763, 764, 766; Act of March 3, 1885, c. 353, 23 Stat. 437.

In this instance an appeal was granted by this court, and proceedings specifically ordered to be stayed. The persons who hung and shot this man were so impatient for his blood that they utterly disregarded the act of Congress as well as the order of this court.

As heretofore stated, the defendants to the information remaining to be dealt with on the facts are Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse and Ward. Of these, Shipp was the sheriff and Galloway and Gibson two of his deputies. The others are charged with active participation in the lynching. It is contended that the lynching was not expected to occur on the 19th, and the evidence of the United States district judge, and some clergymen and others was given to the effect that they had no such anticipation. The event showed that they were wrong, and it is plain the danger might be very great and yet remain unperceived by the adherents of order and peace.

It will be remembered that the crime was committed on January 23, and Johnson was arrested January 25. That night a mob attacked the jail in which he was supposed to be and ascertained that he was not there. Johnson was kept in Nashville from that day until his trial commenced, February 6. On his conviction, February 9, he was taken away from Chattanooga and kept away until March 11, the day after his petition for *habeas corpus* was denied.

It must be admitted that intense feeling against Johnson existed from the

time of the commission of the crime until after his conviction, and that this feeling frequently manifested itself, although Johnson was not in Chattanooga from the time of his arrest until his trial began. The intensity of this feeling and the great apprehension of the officers of mob violence is shown in the testimony of defendants' own witnesses, describing the precautions and secrecy exercised by them in the way they took Johnson in and out of Chattanooga, as well as by the fact that they kept him away from Chattanooga from the day of his arrest until March 11, two days before the time set for his execution, with the exception of the three days he was there attending his trial. Undoubtedly the public believed that Johnson would be executed on March 13, until the reprieve to March 20 was granted on March 11; and after the petition for *habeas corpus* was denied by the Circuit Court believed that Johnson would then be executed on the 20th.

Sheriff Shipp testifies that inflammatory reports of the *habeas corpus* proceedings and efforts to appeal the case to the Supreme Court were sent out by the newspapers on March 11, and because of that he had fear of mob violence to Johnson. The efforts made by Johnson's attorneys to obtain an appeal were kept before the public by the newspapers.

March 16 The Chattanooga Times published a statement that a negro attorney had gone to Washington to obtain an appeal from the order denying the petition for *habeas corpus.* The article said:

"People here are decidedly anxious as to whether Johnson is to suffer death for his crime next Monday or escape for an indefinite period by reason of intervention of the court at Washington. More unrest on the subject exists than was anticipated when Johnson was brought back to the county.

* * * * * *

"During the recent days of suspense as to his execution the desire for information has been feverish, and telephones at localities where information has been thought to be obtainable have been kept busy by inquirers."

In The News, published the evening of March 19, there was an editorial reviewing the local proceedings, which concluded:

"All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty and that he ought to suffer the penalty of the law as speedily as possible. If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here if another such crime is committed. Such delays are largely responsible for mob violence all over the country."

The assertions that mob violence was not expected and that there was no occasion for providing more than the usual guard of one man for the jail in Chattanooga, are quite unreasonable and inconsistent with statements made by Sheriff Shipp and his deputies that they were looking for a mob on the

next day. Officers and others were heard to say that they expected a mob would attempt to lynch Johnson on the 20th. There does not seem to be any foundation for the belief that the mob would be considerate enough to wait until the 20th. If the officers expected a mob at all, as they say that they did, they cannot shield themselves behind the statement that they expected it on the 20th, the day that had been appointed for Johnson to die, and did not expect it the night before. But no orders had been given and nothing had been done up to half-past eight o'clock on the night of the 19th to protect Johnson from the mob which was, according to their present statements, expected the next day.

Testimony was given by a servant in Shipp's house that a week before Johnson was lynched Shipp was heard to say that if the execution were stayed Johnson would be mobbed. This was, however, disputed by Shipp and relatives of his who were there at the time.

On May 28th, at Birmingham, Alabama, defendant Shipp himself, in an interview reported and printed the next morning in The Birmingham Age-Herald, said:

"'The first I knew of the mob was through a telephone message I received from The Chattanooga Times office, for they had cut the wires at the county jail immediately upon their arrival. I dressed as quickly as possible and went to the jail, and found a crowd of about seventy-five people around it, most of them being in disguise. I made my way through the crowd into the jail and began remonstrating with them against taking any drastic steps. They seized me and took me upstairs, locking me up in a bathroom. The members of the mob told me they meant no violence to me. I argued with them against doing anything at all, since the law had so far taken its proper course. *I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could.* In the first place, I could have done no good, as I was overwhelmed by numbers.

"'The Supreme Court of the United States was responsible for this lynching. I had given that negro every protection that I could. For fourteen days I had guarded and protected him myself. The authorities had urged me to use one or two military companies in doing so, but I told them I would land the negro in jail, which I did, individually.

"'Many nights before the lynching there had been a sufficient guard around the jail. *I had looked for no trouble that night and, on the contrary, did not look for it until the next day.* That night no one was on duty except the jailer, which is the usual guard at our jail, as well as in other counties.

"'In my opinion the act of the Supreme Court of the United States in not allowing the case to remain in our courts was the most unfortunate thing in the history of Tennessee. I was determined that the case should be put in the hands of the law, as it was. The jury that tried the negro Johnson was as good as ever sat in a jury box.

"'The people of Hamilton County were willing to let the law take its course until it became known that the case would not probably be disposed of

for four or five years by the Supreme Court of the United States. The people would not submit to this, and I do not wonder at it.

"'These proceedings in the United States Supreme Court recently appear to me to be only a matter of politics. I do not wish to appear in the light of defying the United States court, but I did my duty. I am conscious of it, thoroughly conscious of it, and I am ready for any conditions that may come up.'"

The testimony of the reporter that Shipp made these statements was corroborated by the evidence of another reporter who interviewed Shipp on the following day regarding them, and is not denied by Shipp except in an immaterial particular. From this it appears that defendant Shipp looked for trouble on the 20th, but, as he says, not that night; that he did not attempt to hurt any of the mob, "and would not have made such an attempt if I could."

He evidently resented the necessary order of this court as an alien intrusion, and declared that the court was responsible for the lynching. According to him, "the people of Hamilton County were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States." "But," he added, "the people would not submit to this, and I do not wonder at it." In other words, his view was that because this court, in the discharge of its duty entered the order which it did, that therefore the people of Hamilton County would not submit to its mandate, and hence the court became responsible for the mob. He took the view expressed by several members of the mob on the afternoon of the 19th and before the lynching, when they said, referring to the Supreme Court, that "they had no business interfering with our business at all." His reference to the "people" was significant, for he was a candidate for re-election and had been told that his saving the prisoner from the first attempt to mob him would cost him his place, and he had answered that he wished the mob had got him before he did.

It seems to us that to say that the sheriff and his deputies did not anticipate that the mob would attempt to lynch Johnson on the night of the 19th is to charge them with gross neglect of duty and with an ignorance of conditions in a matter which vitally concerned them all as officers, and is directly contrary to their own testimony. It is absurd to contend that officers of the law who have been through the experiences these defendants had passed through two months prior to the actual lynching did not know that a lynching probably would be attempted on the 19th. Under the facts shown, when the sheriff and his deputies assert that they expected a mob on the 20th, they practically concede the allegation of the information that they were informed and had every reason to believe that an attempt would be made on the evening of the 19th or early on the morning of the 20th.

In view of this, Shipp's failure to make the slightest preparation to resist the mob; the absence of all of the deputies, except Gibson, from the jail during the mob's proceedings, occupying a period of some hours in the early evening; the action of Shipp in not resisting the mob and his failure to make any reasonable effort to save Johnson or identify the members of the mob, justify the inference of a disposition upon his part to render it easy for the mob to lynch Johnson, and to acquiesce in the lynching. After Shipp was informed that a mob was at the jail, and he could not do otherwise than go there, he did not and in fact at no time hindered the mob or caused it to be interfered with, or helped in the slightest degree to protect Johnson. And this in utter disregard of this court's mandate and in defiance of this court's orders.

Let us recapitulate the facts bearing immediately on defendant Shipp.

About 9 o'clock on the night of the 19th the judge before whom Johnson was tried, and the attorney who prosecuted him, communicated with Sheriff Shipp at his house, saying that there were persons around the jail who looked suspicious, and suggesting that the sheriff had better go down to the jail.

At that time a report was generally circulated in the city that a mob was at the jail to lynch Johnson.

Shipp lived only a few blocks from the jail. He reached the jail about nine. He was alone. A number of people were in the jail and outside of it when he arrived. He anticipated a mob was inside.

Without stopping to speak to any of these people he rushed inside of the jail to the foot of the stairs leading to the floor Johnson was on. There he was taken hold of by five or six men and carried upstairs. The men who took hold of him had no firearms.

At first he was put in a bathroom, and then was released and stood around near the corridor door, where the mob was at work, with three or four unarmed men around him. He made no effort to get away or use force in opposing the mob. He did not attempt to use his pistol or call for help. After the corridor door had been broken in, either Shipp or defendant Gibson told the mob which cell Johnson was in. When the mob left the jail with Johnson, Shipp did not follow or make any effort to rescue Johnson or get others to help rescue him. He was not locked up when the mob left the jail, but was left entirely free.

When the crowd following the lynchers was about two blocks from the jail, Shipp came out of the building alone and unguarded. To a request made by a man at that time to go and identify members of the mob, Shipp replied that it would be dangerous and foolish. This request was made before the shooting occurred.

A special deputy met Shipp at the jail just after Johnson had been

taken out and before he was shot. Shipp told him that the mob had Johnson. Shipp was quiet, and made no effort to go after the lynchers, or to reach the police or militia or others.

When he reached the jail he could have gone about three blocks to the police station and got the police.

No alarm bell was rung at the court house that night, although it was rung the night of the attempted lynching January 25, and it drew out a big crowd. No attempt was made by Shipp or others to summon a posse. He sent no one after deputies. He made no effort to send any one for help.

It is testified that some time after the mob had left the jail for the bridge, Shipp sent Galloway and Clark down to the bridge, but he made no effort to go himself.

There was in the crowd around the jail and at the scene of the lynching a substantial number of law-abiding men of good character.

That assistance in suppressing the mob might have been easily obtained if effort had been made is shown by the testimony of the chairman of the board of safety, who testifies that at the time of the first lynching in going four or five blocks to the jail he gathered about 16 men to help put down the mob.

The militia was drilling on the night of the 19th between 8 and 10:30 in the armory, a well-known place, three blocks from the jail. It was not called upon to assist in suppressing the mob, although it had been called out twice before by the governor, and was bound to respond to another call by him.

The governor had given assurances that any help asked for would be given, and we have no doubt he would have responded, for he would have had the honor of Tennessee in his keeping.

Numerous witnesses testify that no firearms were displayed by the mob except that one of their number was in the office of the jail with a Winchester rifle, and one pistol was exhibited to a reporter when the door was being broken open.

No deputies put in an appearance while the mob was at the jail or during the lynching, except Frank Jones, who approached the jail with a prisoner, but upon seeing the mob immediately left with the prisoner, and excepting Matt Galloway, who was seen in the crowd.

From the time he reached there, about 6 o'clock, until the mob came, Gibson was the only officer in charge of the jail. But there was much evidence that customarily many deputies were there nightly, and that several were present on the night of the 19th until just before the irruption of the mob.

Heavy iron chains were sometimes used as additional guards upon circular doors in the jail, such as that leading to Johnson's corridor. These

were locked by the prisoners on the inside. During the trial of Johnson these chains were used on the circular doors. But none were on the circular door leading to Johnson's cell on the 19th. It also appears that Johnson's cell door was not locked.

Winchester rifles which were kept to defend the jail against mob violence were, at the time the mob attacked the jail on the 19th, in a show case in the office. These were taken out of the show case by the mob and unloaded.

Although Shipp was in the midst or near the members of the mob for about an hour when they were in the jail, he did not seek to obtain information so that he could identify any of them, and he testifies that he does not know any member of the mob.

Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence—Shipp not only made the work of the mob easy, but in effect aided and abetted it.

Gibson is involved in the same condemnation though under less responsibility, We think belief on his part that a mob would attempt to enter the jail and lynch Johnson on the night of the 19th must be presumed.

The day jailer left the jail some time after six o'clock, and transferred the keys to Gibson, the night jailer. Gibson's 15-year old boy was with him, but went to the opera house at 8.30. Gibson was in charge of the jail more than two hours before the arrival of the mob, and he made no effort to summon assistance to repel the attack, although necessarily he must have known that he alone could only offer slight resistance. Mrs. Baker, a white woman, confined on the same floor with Johnson, testified that Gibson, soon after arriving at the jail, when she had gone down stairs to get a letter written, said to her that a mob was coming, and directed her to go to her room, and when the mob was at the jail came to her door and told her that no one would hurt her. Gibson admits the last statement, but denies the first.

He testifies that when he heard the mob he went into the hospital cell, located on the top floor, and sat down on a lounge, and as soon as the mob got upstairs he handed over to them his pistol and the keys, including a key to the door of Johnson's cell; that he did not try to use the pistol, or to resist the mob by force; that from the top floor he could have gone through the kitchen into the yard and back of the jail, but he made no effort to do so, although it took the mob some ten minutes after he knew they were there to break through the door between the outer door and the jail proper; that he just gave up and made no effort at all to resist the mob or rescue Johnson after they had left the jail; that although the men were bold in their work, he failed to recognize any one excepting Nick Nolan.

Galloway was a deputy sheriff from the time Johnson was convicted

until after the lynching, and was told by the sheriff after the mob had left for the bridge to go down there, and did so, but Johnson was then dead. He was Criminal Court deputy, and served Criminal Court papers and made arrests. But he had no charge of the jail or keeping of prisoners except when officially so assigned. He had no connection with the jail or the prisoners at any time after Johnson was brought from Knoxville on the 10th or 11th of March. He testified that he had heard nothing while attending to his duties that made him think Johnson was in danger; was a member of the Eagle Club, and was there on evening of the 19th, at 7:45, not having heard prior thereto anything about any impending lynching. His first information of the lynching was after 10 o'clock, when he went to the jail at once. There he met the sheriff, who asked him to go to the bridge, which he did, but Johnson was dead. We think Galloway must be acquitted of the charges in the information.

This brings us to a consideration of the case in respect of the six defendants, who are charged as members of the mob and participants in its action.

As to Williams and Nolan, there is direct testimony to their participation in the lynching, and we do not think that the evidence relied on to weaken that conclusion is sufficient to do so.

As to Padgett and Mayse, there is testimony of statements on their part on the afternoon of the 19th and the morning of the 20th, which, if believed, demonstrates their guilt. We have carefuly examined and analyzed the evidence to impeach the principal witness to these conversations, and also to make out alibis, but we cannot accept it as convincing.

We hold that the case as to Justice and Ward fails on the evidence.

In our opinion it does not admit of question on this record that this lamentable riot was the direct result of opposition to the administration of the law by this court. It was not only in defiance of our mandate, but was understood to be such. The Supreme Court of the United States was called upon to abdicate its functions and decline to enter such orders as the occasion, in its judgment demanded, because of the danger of their defeat by an outbreak of lawless violence. It is plain that what created this mob and led to this lynching was the unwillingless of its members to submit to the delay required for the appeal. The intent to prevent that delay by defeating the hearing of the appeal necessarily follows from the defendants' acts, and if the life of any one in the custody of the law is at the mercy of a mob the administration of justice becomes a mockery. When this court granted a stay of execution on Johnson's application it became its duty to protect him until his case should be disposed of. And when its mandate issued for his protection was defied, punishment of those guilty of such attempt must be awarded.

The rule will be discharged as to the defendants Galloway, Justice and Ward, and made absolute as to the other defendants.

Rule discharged as to defendants Galloway, Justice and Ward, and made absolute as to defendants Shipp, Gibson, Williams, Nolan, Padgett and Mayse. Attachments to issue, returnable on Tuesday, June 1.

Mr. Justice MOODY did not hear the argument and took no part in the disposition of the case.

No. 2.

Ed Johnson, Appellant, *vs.* The State of Tennessee. } Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

[May 24, 1909.]

The CHIEF JUSTICE: Appeal abated by death of appellant, and case dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 5, Original.—October Term, 1908.

The United States of America
vs.
Joseph F. Shipp et al. } Information in contempt.

[May 24, 1909.]

Mr. Justice Peckham dissenting.

I dissent from the opinion and judgment of the court in this case, and I think its importance requires a statement of the reasons for my dissent. In regard to the crime which was perpetrated by the mob upon the person of the negro there can be but one opinion. I take it that all intelligent and respectable citizens who are cognizant of the facts agree that it was murder, without one extenuating circumstance to relieve its atrocious character. The important question, however, is, first, as to the sheriff—whether he is guilty of the charge made against him in the information filed in this proceeding. The charge, as contained in the information, upon which such a vast amount of evidence has been taken, is that the sheriff, and many other persons, conspired together for the purpose of breaking and entering the county jail and taking therefrom the negro Johnson, in order to lynch him, with the intent to thereby show their contempt and disregard of the order of this court and to prevent the hearing of the appeal.

A careful consideration of the case leaves me with the conviction that there is not one particle of evidence that any conspiracy had ever been entered into or existed on the part of the sheriff, as charged against him. It is not alone that the evidence preponderates in his favor, but it seems to me there is no material evidence against him, certainly none that rises higher than the merest possible suspicion, founded upon evidence of facts which are in themselves wholly inconclusive, and just as consistent with innocence as with guilt. His character is shown by many witnesses to be that of the highest. Not a man in Chattanooga stands better as a man and a citizen than he does. There is not a particle of evidence to the contrary. He has lived an honored and respected citizen of that city since 1874; has held honorable official positions before the one that he now holds, and yet, as an old man, he is adjudged guilty of a contempt of this court and liable to serve a disgraceful imprisonment because, as is insisted in this record,

he did not do as much towards resisting a lawless mob as this court says he ought to have done.

The crime for which Johnson was convicted was perpetrated on a white schoolgirl on the 23d of January, 1906, and on the 25th of that month Johnson was arrested near Chattanooga and charged with the crime. After being arrested he was taken by the sheriff, by order of the State Criminal Court, to the jail at Nashville, where he was kept until the day of his trial, February 6. The sheriff was active and intelligent in his efforts to preserve the safety of the negro. No adverse criticism is or can truthfully be made upon his conduct at that time. At the time of the arrest of the negro there is no contradiction in the evidence that there was very great excitement and a disposition evinced to lynch Johnson at once. A crowd of over a thousand, it is said, surrounded the jail on the night of the 25th of January, where Johnson was supposed to be, but the prisoner was not in the jail, and the deputies of the sheriff (the sheriff himself, having Johnson in custody, was taking him to Nashville) exhorted the mob to disperse, and finally people were sent into the jail on behalf of the mob, and went through it to satisfy themselves that Johnson was not there. The mob thereupon dispersed. On the 26th of January a grand jury was convened and Johnson was indicted, and on the 6th of February he was brought to Chattanooga from Nashville, and his trial was commenced that day in the Criminal Court. On February 9 he was convicted and sentenced to death. No appeal was taken by the lawyers appointed by the court to defend him from that sentence. The lawyers said they feared the prisoner would be lynched if such an appeal were taken. On his conviction he was taken from Chattanooga to Knoxville, in the personal custody of the sheriff, to be safe from any possible violence of the mob. No mob, however, appeared, and nothing was attempted. The judge who presided at the trial of the negro, after his conviction, told the sheriff that the prisoner would be entirely safe at Chattanooga. After the trial the excitement decreased very greatly and seemed to disappear entirely. Of this fact there is no contradiction in the evidence. On the 3d of March a petition for a writ of *habeas corpus* was filed in the United States Circuit Court for the Northern Division of the Eastern District of Tennessee on the part of Johnson. On the 10th of March the petition was denied, and the Circuit Judge ordered that Johnson be remanded to the custody of the sheriff of Hamilton County (at Chattanooga), Tenn., to be detained by the sheriff in his custody for ten days, in which to permit Johnson to prosecute an appeal from the order, and in default of the prosecution of such appeal further proceedings to be taken in the State court of Tennessee, under its sentence. Immediately after this decision Johnson was taken back to Chattanooga, arriving there March 11. Everything was quiet and there was no evidence of excitement, nor of any intention whatever to interfere with the negro.

The sheriff kept watch of public sentiment for several days thereafter. He was himself going about through the city, mixing with all manner of crowds, and found not the slightest evidence that would lead any reasonable man to believe that any assault was intended upon Johnson. The sheriff stated that he did some canvassing in his election campaign during this time, and was around in the manufacturing establishments and saw no excitement and heard no talk of the case during the whole time. There was nothing at all, says the sheriff, that came to his knowledge during this time that would have put a prudent and careful man on his guard.

On the 19th of March, the day preceding the night of the lynching, the same thing was noticed of a total lack of any evidence of any excitement or of any evidence of an intention to commit any violence. Thus from the 11th to the 19th of March—from the time that Johnson was brought back from Knoxville to Chattanooga, after Judge Clark, the United States judge, had denied his petition for *habeas corpus*—the city was entirely tranquil and nothing was done which would have caused any man, even the most circumspect and prudent, to believe that any violence was intended. During the time, from the 11th to the 19th of March, there had been no extra guards at the jail because of these facts. No demonstration had been made against the jail and no threats made against the prisoner that anybody heard. Judge Clark, now deceased, who had been a resident of Chattanooga since 1883, was a witness in this proceeding, and stated that he had never heard anything suggested as to there being any danger to Johnson if the stay of execution were granted in his case. Judge Clark said: "It strikes me it was absolutely absurd in view of what actually occurred." The judge was also asked whether anything said at the trial of the *habeas corpus* proceedings on the part of the representatives of the State, or on the part of any one, caused him to apprehend any mob violence to this man, and the judge said, none in the least. The judge also said that he had asked his secretary on the day that he was at Chattanooga on his way to St. Augustine if he had heard of any suggestions or hints of violence or dissatisfaction with the situation, and the secretary told him that he had not. On the 19th of March, he had, he said, called up some one of the defendant's attorneys and found out that the appeal from the order denying the *habeas corpus* had been allowed by the Supreme Court of the United States, and the judge said to the attorney that he would be there all day at his office and would leave for Florida that night. The judge said the reason he made that announcement was that he had known that Johnson had been taken to another jail prior to this, and that he was brought out of the Knoxville jail when the petition for *habeas corpus* was brought up before him (Judge Clark). "Therefore," Judge Clark said, "on account of that, after getting Mr. Justice Harlan's telegram, I would have ordered the man to any jail

where it was desired to send him . . . if it had appeared that the prisoner was in great or real danger—if that had appeared to me—I am quite sure that I would have made the order of my own motion, or would have called up his attorney and suggested that he make an application for his removal." The following question was also put to the judge: "Q. Judge Clark, I will ask you if the attorney to whom you talked or any other attorney for the defendant Johnson, or any other person, suggested to you the necessity or even the propriety of taking steps to protect your prisoner, the Federal prisoner Johnson? A. I never heard the remotest suggestion, and I did not think the man was in any danger. I thought it was simply the noise that is generally made by people who really do not expect to do anything. . . . I will say that I had heard no suggestion and that I had no thought that there was any danger on hand anywhere." If there had been any evidence of danger or the possibility thereof, would not the attorneys of the negro who were engaged in the prosecution of their *habeas corpus* proceedings have responded to the judge, and asked for the removal of the negro to another jail? They did not ask for it because, as is perfectly evident, they shared the general opinion that there was no danger; that the former danger had passed, and there was no reason for further action.

The same kind of evidence was given by the most respectable men in the community—editors, reporters, railway agents, large employers of men, clergymen, lawyers, doctors and business men, citizens of the place, and also by the chief of police of the city. Not one of them apprehended danger of mob violence at that time. All of these men were cognizant of the facts as to the prior attempts at lynching and as to the high state of excitement which existed at that time. But they all agreed that such excitement had entirely passed and that there was not the least danger to be apprehended. One of these ministers, the Rev. Mr. Boswell, had been a resident of the city for nearly four years, and was a member of what is termed the Pastors' Union of Chattanooga. He was also a fraternal delegate from the Pastors' Union to the Central Labor League, composed of delegates from every labor organization in the city, and, as a member of the Pastors' Union, he co-operated with the Central Labor League as a fraternal delegate. He also preached on an average twice a week in the various shops in the city. He said that at the time of the arrest the public feeling was intense and that it subsided with the beginning of the trial. He was present during most of the trial; that after the trial was over he found no talk that would cause him to apprehend that there might be an attempt to lynch the prisoner. He had, he said, preached a sermon on lynching after the first attempt was made and had taken the position that it was a violation of good citizenship, and did not mince his words at all, and

yet with all these opportunities to know the state of public feeling he said that there was nothing that would arouse apprehension on his part, or, so far as he could see, on the part of any prudent man, that there was any lynching threatened. And this, too, after it was known that this court had allowed the appeal from Judge Clark's order. The evidence of the other witnesses was of the same character, and there were unanimous expressions of opinion by the witnesses upon the hearing of this case, that there was no question of danger of mob violence to be apprehended up to the very last moment; and yet counsel for the Government have regarded it as part of the evidence of the guilt of the sheriff as a conspirator that he acted as if he did not apprehend any violence, and that he took no steps to prevent it on the day in question. No one else had any idea that there was any danger and no one else was looking for it. The men who testified that there was no apprehension of mob violence were men who were specially cognizant of the state of public opinion at that time. The counsel for the Government insisted that it was the duty of the sheriff to have had the jail guarded on that day by extra guards, and that his failure to do so was evidence of his being guilty of the conspiracy as alleged in the information. Although the fact was announced in the morning papers of the 19th that the allowance of the appeal had been granted by this court, there was during the day no evidence of excitement and no hostile demonstration or suspicion of it against the prisoner, and no evidence of any fact going to show any projected formation of a mob or the least probability of any lynching or any attempt that night. Under these circumstances, on the 19th of March the sheriff went home about half-past six in the evening, leaving things at the jail the same as usual. Suppose, as a matter of judgment, the sheriff should have proceeded as if this almost universal sentiment as to the absence of all danger was erroneous, or not well founded, and that as matter of good sense he should have had the jail guarded, is it possible that he can be properly convicted of contempt while he agreed with this public sentiment and acted accordingly? At any rate, he went home as usual, and was sitting at his desk in his home when the telephone sounded some time about nine o'clock and he recognized, upon going to it, the voice of the Attorney General, Whittaker, who asked him if he knew what was going on at the jail, and the sheriff said, "No," and the Attorney General said, "You had better go down there." He went down there as rapidly as he could, running most of the way and walking rapidly for the rest, and, being under the care of a physician for a difficulty of the stomach, he was much exhausted when he arrived at the jail, where a large number of men were assembled, many of them armed, and they immediately surrounded and took possession of him. Many of them were masked and were waiting for their comrades to bring Johnson down. The

sheriff expostulated and remonstrated with these men and asked them to desist, when they seized him. He was seized from behind, and he testified that he did not know but that they were going to do him some violence, and he reached back for his gun, which he had in his pocket. They assured him that they did not intend to hurt him and then they seized and rushed him up the stairs and carried him into a hallway, where he was kept a prisoner until after the crowd had got Johnson and left the jail with him. The sheriff was sixty-three years of age at this time, and, on account of his physical condition, unable in any event to have offered any great resistance. There were at least ten or fifteen of the men around him who were armed, and the sequel proved that many more in the crowd were also armed. Others were standing back looking on. Whether the sheriff might possibly have been quicker with his gun and taken it out of his pocket and shot some of them, is not certain, from the evidence, but the odds of even ten or fifteen to one are somewhat large, and that he did not kill, or attempt to kill, any of them is no evidence whatever of complicity with these miscreants, and certainly no evidence of contempt of this court. It seems to me most extraordinary that even an official under these circumstances can be found guilty of a contempt because in fact he did not resist to the death.

Argument has also been made against the sheriff, based on the fact that on his way from the house to the jail he did not seek out the militia, a company of which is said to have been engaged in drilling that night in its drill room, and ask for assistance immediately at the jail. It may be that such would have been a wise course, but he was acting on the spur of the moment and under a call to come immediately to the jail, and he was not sure of what was going on, and in seeking the aid of the militia he was not certain to succeed in obtaining immediate assistance. At any rate, the mere fact that he did not think of it or stop to do it is no evidence whatever to show that his failure to seek its aid was criminal. I think the conspiracy part of the information is absolutely without evidence to support it.

It is, however, argued that the sheriff did not otherwise do all that he should have done to prevent this infamous crime, and hence that he is guilty of a contempt. As evidence of this fact the Government refers to the interview of the 28th of May between the sheriff and a newspaper reporter in Birmingham. On that day, at the time of the interview, news had been received of the action of this court ordering certain persons to show cause as for contempt. In this interview Sheriff Shipp said that the first he knew of the mob was through a telephone message; that he went to the jail and made his way through the crowd, and remonstrated with them against taking any drastic steps. They seized him and took him upstairs, locking him in a bathroom. The members of the mob told him

they meant no violence to him. He argued with them against doing anything at all, since the law had so far taken its proper course, and the interview went on with this statement: "I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could. In the first place, I could have done no good, as I was overwhelmed by numbers." The sheriff's statement that he made no attempt to hurt any of the mob, and would not have made such an attempt if he could, must be taken with the rest of his statement, in which he said that "in the first place, he could have done no good by it, as he was overwhelmed by numbers." There is no doubt of the truth of that statement. He was one man against, at the very least, ten or fifteen or more resolute men, armed and assembled for the purpose of getting this negro, and surrounded by a still larger crowd in the jail yard, and there is not the slightest evidence that they were unarmed. Their subsequent action shows an unnecessary supply of guns. It is true, the sheriff might possibly have drawn his gun and fired at the masked men as he came into the jail and succeeded in killing one and perhaps more of the members of the mob, but it is absolutely true that it would have done no good even then, because with such odds against him his struggles could have resulted only in his being actually overwhelmed and possibly killed, while the negro would not have been saved. The sheriff occupied no vantage ground from which to repel an attack and where his first assailant would stand a good chance of being killed by him. He was not only in the power of the mob who had him in custody, but he was also without any one to appeal to for aid. Those who were bystanders knew of the sheriff's difficulty without further appeal by him, and yet they seemed to feel no desire to interfere or else recognized the uselessness at that time of any effort.

The evidence of witnesses for the Government showed without contradiction that the sheriff came to the jail running as fast as he could; that he pushed through the crowd, shoved the men aside and entered the inside of the enclosure, never stopping at all, and the moment he arrived at the jail door he was set upon and seized by four or five men and overpowered, and he talked to and expostulated with the crowd, trying to reason with them and to get them to stop. When asked if the sheriff made any show of force, the Government witness said, "Well, he didn't have any chance to," and the question being repeated, the witness said, "Well, he did, yes, but he was overpowered," that "he resisted their efforts to hold him," by "trying to pull away." (Evidence of Curtis, one of the reporters on The Chattanooga Times, and a witness for the Government.) The evidence of another reporter, Mr. Chivington, and a Government witness, was to the same effect, that the sheriff was seized by four or five men and overpowered,

and carried upstairs, and that he appealed to the mob not to lynch the negro. The witness also said that at this time, just as the sheriff was seized, the witness imagined he saw the sheriff "like he was going to draw a pistol, but before he could move any further there were five or six fellows grabbed him and carried him bodily to the top of the stairs."

All this time there was not an offer from a single man to aid the sheriff when they saw him seized, nor did any of them spread any alarm or ask for any outside aid, and the sheriff says he did not ask for it because he knew it would be useless to make any such appeal to the persons there, and that every one there knew the situation, and the overwhelming numbers of the crowd surrounding the premises and in the jail.

Of course, as the witnesses heard the sheriff expostulating with and begging the crowd to do no harm to the negro, if there had been the least disposition on the part of any one to come to his aid the opportunity to do so was quite open and plain.

The appearance of the sheriff after the taking of the negro, and the effect of the whole occurrence upon him is stated in the evidence, about which there is not the slightest contradiction. He was greatly excited, and almost in a faint. He was as white as a sheet, and said to the witness, "My God! I did everything I could." He also said in the course of the interview with the witness, "'My God! they have ruined me.' He had all the appearance of a man who was ready to collapse. You could barely understand what he said. His voice was in a tremble, like a voice filled with emotion." This is the evidence of Mr. Horan, and it is nowhere contradicted. And yet the Government claims that in such a case the sheriff should be imprisoned for a contempt of this court because he did not do more in the way of resistance to an overwhelming force, and did not foresee with more clearness than any one else what was to happen on the night of the 19th, and take measures accordingly to guard the safety of the negro. It seems to me that the opinion of the court is founded upon this view.

Then, again, this is not a question as to whether possibly the sheriff might have done more than he did. Some men, under such circumstances, might perhaps have earlier attempted to draw their guns, and would possibly only have ceased resistance with their lives. But when one is really overpowered, superior force makes efforts at resistance futile, if not foolish. Other men might do less than this man did and still be absolutely innocent of a contempt. The question is not whether this invalid old man did everything that he possibly could have done up to the last extremity and at the risk of his life in the performance of his duty as sheriff. To be free from any contempt of this court it was not necessary that the sheriff should have stood by the prisoner at the peril of his own life or that he should have sacrificed it in an unsuccessful

attempt against overwhelming odds to prevent the mob from taking the prisoner out of his custody. The sheriff, under circumstances such as are detailed in this case, should be freed from the charge of contempt if he were not guilty of any conspiracy with others to lynch the prisoner, and if he honestly and fairly did what he could in the way of remonstrance and exhortation to prevent the lynching. Being in the power of the mob, he was not called upon to sacrifice his life in a desperate and hopeless attempt to save his prisoner against odds, such as appeared in this case, or else take the risk of being adjudged guilty of a contempt of court. But what could the sheriff have done more than he did do? That he was in the power of these men is absolutely without contradiction from the evidence. If he had had his pockets full of pistols he could have done nothing with them, as the evidence shows, the moment he was seized by the crowd. His statement that the mob took action because of the allowance of the ~~writ of error~~ appeal by this court, which they thought might involve great delay, and that the mob would not stand for that, is but the expression of an opinion by the sheriff as to the reason for the lynching. He does not and did not pretend to justify the action. In all probability that was the reason—a dislike of the interference of this court—a reason utterly without justification and disgraceful to those who entertained it. But the sheriff surely cannot be properly convicted because he simply truthfully stated the sentiments which in his judgment actuated the mob. It is not a crime to entertain an opinion as to what moved a mob under these circumstances nor can this court properly, in my judgment, convict an official of contempt because he stated his belief that the mob acted from this most disgraceful reason. Nor is the opinion, as expressed, the least evidence of the guilt of the sheriff of the contempt with which he is charged, or of any conspiracy to commit it.

In the interview the sheriff also said he had looked for no trouble that night, and on the contrary did not look for it until the next day. It will be remembered the next day was the one appointed for carrying into execution the sentence of the State court, and when the day should pass without the sentence being carried into execution the sheriff said afterwards that he apprehended there might be trouble. But that was the next day, and the trouble apprehended would be founded upon the happening of that day, and there was an abundance of time in which to prepare for what might then be attempted. Whatever the sheriff may have thought of the delay which might be caused by the appeal to this court, or however ill-founded his opinion as to the probable length of that delay, his thoughts on the subject furnish no evidence even tending to show that he conspired with the mob or that he would not do what he could to protect his prisoner when the exigency arose and the time for action arrived. He may have

thought there would be great delay, and for that reason did not wonder the people would hate to submit to it. All this, however, is mere evidence as to what it was supposed a mob might do the next day, but is, as I have repeated already, no evidence of conspiracy on the part of the sheriff to aid the mob, and none that he was guilty of a contempt in not resisting or attacking it up to the point of imperilling his life in a futile attempt to protect his prisoner. It seems to me that the sheriff is being held to a degree of responsibilty far beyond any reasonable limit, and not justified by the evidence contained in the record.

The Government based its argument for a conviction of the sheriff very largely upon the interview above referred to, and which I have commented on at some length. Strike that out and there is really nothing whatever on which to base the shadow of a claim for a conviction. For the reasons given I think the interview itself is wholly insufficient as evidence of the guilt of the sheriff, and I think the rule to show cause should be discharged as to him. I also think the evidence is too slight upon which to convict the jailer.

I am authorized to say that Mr. Justice WHITE and Mr. Justice McKENNA concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.